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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JUDITH WARNICK and CHARLES WARNICK,
Petitioners,

v.

JIN CHA, M.D., INDIANA DEPARTMENT
OF INSURANCE, and DON H. MILLER,
as Commissioner of Insurance
of the State of Indiana

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

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QUESTIONS PRESENTED

I. Whether the Indiana Medical Malpractice Act which was enacted to protect the vital interests of the community in securing the availability of the professional services of physicians and other health care providers is constitutional.

II. Whether the petitioner has failed to produce sufficient evidence that there no longer is a medical emergency in the state; that the delay caused by the Medical Malpractice Act is any greater than if such cases were not to proceed under the Act; and that the petitioners failed to produce any evidence that they were delayed because of the Act.

III. Whether the petitioners had standing to bring declaratory action.

IV. Whether the Indiana Court of

Appeals' opinion in Jin Cha v. Judith Warnick, _____Ind.App._____, 455 N.E.2d 1168, is the law of the case with respect to the issues raised by petitioners concerning the alleged unconstitutionality of the Indiana Medical Malpractice Review Act.

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Authorities

I.C. §16-9.5-9.1, et seq.

I.C. §34-4-10-1, et seq.

STATEMENT OF THE CASE

The petitioners initiated this action on January 20, 1983, by the filing of their complaint for declaratory judgment in the Lake Circuit Court, Indiana. The substance of the complaint alleged that the Indiana Medical Malpractice Review Act, I.C. §16-9.5-9.1 et seq., was unconstitutional. The petitioners previously filed a medical malpractice action in the Lake Circuit Court, Indiana, on March 26, 1982. That action eventually resulted in a default which was appealed by respondent and an opinion was issued by the Court of Appeals, 3rd District of Indiana, on November 16, 1983, vacating the default judgment. The Indiana Supreme Court denied the petitioners petition to transfer in the default action on March 16, 1984.

This declaratory judgment action was tried in Jasper Superior Court, Indiana, on September 30, 1983. On November 2, 1983, that Court issued an order holding the Indiana Medical Malpractice Review Act unconstitutional. The respondents timely filed motions to correct errors, but the Court overruled respondents' motions on January 3, 1984. The record of proceedings was timely filed with the Clerk of the Indiana Supreme Court on April 30, 1984. On April 3, 1985, the Indiana Supreme Court reversed the Jasper Superior Court and ruled that the Indiana Medical Malpractice Review Act was constitutional. A petition for rehearing was denied on May 28, 1985. The petition for Writ of Certiorari was filed within 90 days of such order.

SUMMARY OF ARGUMENT

I

WHETHER THE INDIANA MEDICAL MALPRACTICE ACT WHICH WAS ENACTED TO PROTECT THE VITAL INTEREST OF THE COMMUNITY IN SECURING THE AVAILABILITY OF THE PROFESSIONAL SERVICES OF PHYSICIANS AND OTHER HEALTH CARE PROVIDERS IS CONSTITUTIONAL.

It is the position of the respondent that the Indiana Medical Malpractice Act, I.C. 16-9.5-9-1, et seq., is constitutional and that the evidence introduced in this case is not sufficient to change the Indiana Supreme Court's holding in Johnson v. St. Vincent Hospital, _____ Ind._____, 404 N.E.2d 585 (1980), since that Court contemplated severe delays and stated that they were not so restrictive as to violate rights secured under the Constitution. In Johnson, the Indiana Supreme Court found that there was a "ground of difference" that makes clear

the reason for the different and more burdensome treatment accorded medical malpractice tort claimants and explained the corresponding special consideration given to the health care providers.

II

WHETHER THE PETITIONER HAS FAILED TO PRODUCE SUFFICIENT EVIDENCE THAT THERE NO LONGER IS A MEDICAL EMERGENCY IN THE STATE; THAT THE DELAY CAUSED BY THE MEDICAL MALPRACTICE ACT IS GREATER THAN IF SUCH CASES WERE NOT TO PROCEED UNDER THE ACT AND THAT THE PETITIONER FAILED TO PRESENT ANY EVIDENCE THAT THEY WERE DELAYED BECAUSE OF THE ACT.

In order to successfully attack the Act on constitutional ground, petitioners were required to prove the Act was not a reasonable means of achieving the desired result of the continuation of medical services in the state. Petitioner produced no evidence that the Act was unreasonable in achieving the desired aim; therefore, petitioner failed in their burden of proof.

Secondly, no evidence was introduced by the petitioners that the delay caused by the Medical Malpractice Act was any greater than if such cases were not required to proceed under the Act. Petitioner offered no evidence to show an unfavorable comparison with other types of cases. Finally, petitioner failed to present any evidence that they were delayed because of the Act since they did not request the formation of a panel under the Act, and cannot complain of any delays that may have been caused to them.

III

WHETHER THE PLAINTIFFS HAD STANDING TO BRING THIS DECLARATORY JUDGMENT ACTION.

Plaintiffs do not have standing to challenge the constitutionality of this Act on the grounds that they were not adversely affected by the Indiana Medical

Malpractice Act and that there was no case or controversy between the defendants and plaintiffs because of the pending default appeal. The declaratory judgment action should have been dismissed since there was another action pending between the same parties which adjudicated the identical issues involved in the declaratory judgment action.

IV

WHETHER THE INDIANA COURT OF APPEALS' OPINION IN JIN CHA VS. JUDITH WARNICK, _____ Ind.App._____, 455 N.E.2d 1168, IS THE LAW OF THE CASE WITH RESPECT TO THE ISSUES RAISED BY PETITIONERS CONCERNING THE ALLEGED UNCONSTITUTIONALITY OF THE INDIANA MEDICAL MALPRACTICE REVIEW ACT.

The petitioners raised the issue of the constitutionality of the Medical Malpractice Act in their appeal from the default judgment. That cause was ultimately decided by the Court of Appeals in

Cha vs. Warnick, _____ Ind.App._____, 455 N.E.2d 1168. The Court of Appeals found the act constitutional, making the judgment of the Court of Appeals the law of the case. When petitioners' petition to transfer to the Indiana Supreme Court was denied on March 16, 1984, they should then have filed a petition for Writ of Certiorari to the United States Supreme Court. They failed to do so. Therefore, their petition for a Writ of Certiorari in the instant case is not timely filed and should be denied.

ARGUMENT

I. WHETHER THE INDIANA MEDICAL MALPRACTICE ACT WHICH WAS ENACTED TO PROTECT THE VITAL INTEREST OF THE COMMUNITY IN SECURING THE AVAILABILITY OF THE PROFESSIONAL SERVICES OF PHYSICIANS AND OTHER HEALTH CARE PROVIDERS IS CONSTITUTIONAL.

In his petition, the petitioner has asserted that the delay caused by the mandatory submission under the Indiana Malpractice Act, I.C. 16-9.5-9-1, et seq., violates the guarantees of the First Amendment to the United States Constitution, i.e. abridges the claimant's right to petition the government for redress of grievances, violates the Due Process Clause of the Fourteenth Amendment to the Constitution, and finally, that the Act violates the guarantees of the equal protection clause of the Fourteenth Amendment to the Constitution. The Indiana Supreme Court in Jin Cha v.

Warnick, _____ Ind. _____, 476 NE2d 109 (1985), and in Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404 NE2d 585 (1980), carefully scrutinized the Act, and determined that it was indeed constitutional. In Johnson, the court stated that the legislative purpose for enacting the Indiana Medical Malpractice Act was the vital interest of the community in securing the availability of the professional services of physicians and other health care providers. Johnson at _____, 404 N.E.2d at 594.

The Act reflects a specific legislative judgment that a causal relationship existed between the settlement and prosecution of malpractice claims against health care providers, and the actual and threatened diminution of health care services. Since there is a compelling state interest, the Act can only be held

unconstitutional on due process or equal protection grounds if the legislative measure is not a rational means of obtaining the compeling state interest. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 Lawyer's Ed. 563 (1955).

The court recognized that delays were to occur under the Act, and that such delays may be severe when the court stated:

> "The restriction upon the access to courts for patients under the Act is severe, yet based upon the above appraisal for constitutional purposes, it is not so restrictive as to violate the right to access to courts guaranteed by Article I, Section 12, of our Constitution." Johnson v. St. Vincent Hospital, at _____, 404 N.E.2d at 586.

The petitioner has failed to introduce sufficient evidence to indicate that the delays caused by the Act are so severe as to render it unconstitutional according to

the standard enumerated in Jin Cha and Johnson. The court noted in Johnson that the delay in bringing suit required by the Act must be reasonable in light of its aim if it is to pass constitutional muster. Johnson at _____, 404 N.E.2d at 595. It must be remembered that the aim of the Act is to insure the continuation of medical services in the state. This compelling interest must be balanced against the delay caused by the Act. The petitioner has elaborated at length on the delays supposedly caused by the Act, but has only paid lip service to the substantial reasons for the Act.

The mere fact that there is a delay and that the delay may be as long as 23.4 months from time of filing until the time a panel opinion is rendered, is not enough to hold the Act unconstitutional. In dealing with the constitutionality of a

state statutue it is not the province of the court to judge the wisdom or the rightness of its underlying policies. The Act is related to the public health and welfare, and

> "need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Johnson at _____, 404 N.E.2d 594.

Petitioner, in his argument, failed to consider that the delay in the commencement of a trial is part and parcel of every piece of civil litigation. In a much quoted passage, the court in Johnson stated that:

> "It is quite clear that the Medical Malpractice Act does not take away the right to a jury trial. The right is fully accorded after the delay and expense occasioned by the panel submission requirement. . . .

> Delay in the commencement of a trial and the expense of investigating and marshalling evidence are part and parcel of the preparation of any piece of civil litigation. Delay routinely occurs between the decision to prosecute a claim and trial. The expenses for investigation and preparation attend the pre-trial preparation of all claims. The panel submission requirement generates evidence admissible at a future trial of the claim. Delay in the trial occasioned by this process and the cost attendant to it, are a major part like those to be expected in any case. The participation by the parties in the panel processes will satisfy to a great extent their preparation needs." Johnson at _____, 404 N.E.2d at 592.

Therefore, the delay complained of does not change the substantial elements and incident of the jury trial right for either party.

With regard to petitioner's allegation that the Act violates the equal protection and due process clauses of the Fourteenth Amendment, it is the position of the respondent that there is a "ground of

difference" that makes clear the reason for the different and more burdensome treatment accorded medical malpractice tort claimants and explains the corresponding special consideration given to health care providers. As noted by the court in Johnson the fair and substantial relation standard is to be applied with regard to Fourteenth Amendment arguments. The court specifically found in Johnson that the legislative purpose to be served is clear; its goal is to protect the health of the citizens of the state by preventing reduction of health care services. Johnson at _____, 404 N.E.2d at 597.

Finally, the Supreme Court of the United States noted in Munn v. Illinois, 94 U.S. 113, 24 Lawyer's Ed. 77 (1877), quoted in Hurtado v. State of California, 110 U.S. 516, 531, 4 S.Ct. 111, 119, 28 Lawyer's Ed. 232:

> "Rights of property which have been created by the common law, cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will or even at the whim of legislature, unless prevented by constitutional limitiations. Indeed, the great office of statute is to remedy the defects in common law as they are developed and to adapt it to the changes of time and circumstances."

Certainly, the modern times and circumstances dictate that in order to provide medical services for the people of Indiana, the Medical Malpractice Act is necessary and must be found to be constitutional.

II. WHETHER THE PETITIONER HAS FAILED TO PRODUCE SUFFICIENT EVIDENCE THAT THERE NO LONGER IS A MEDICAL EMERGENCY IN THE STATE; THAT THE DELAY CAUSED BY THE MEDICAL MALPRACTICE ACT IS ANY GREATER THAN IF SUCH CASES WERE NOT REQUIRED TO PROCEED UNDER THE ACT; AND THAT THE PETITIONER FAILED TO PRODUCE ANY EVIDENCE THAT THEY WERE DELAYED BECAUSE OF THE ACT.

A. Petitioner Failed to Produce Any Evidence That There No Longer is a Medical Emergency in Indiana.

The purpose of the Medical Malpractice Act is to insure that medical services are available to the citizens of Indiana. The legislature found that there was a medical emergency in Indiana, and that the Act was a reasonable means for dealing with that emergency. In order to successfully attack the Act on constitutional grounds, petitioners must prove that the Act was not a reasonable means of achieving the desired result of the continuation of medical services in the state. The court in Johnson stated that the delays caused by the Act to tort claimants are severe. Johnson at _____, 404 N.E.2d at 596. Petitioner has produced evidence showing the extent of the delay, but has failed to meet his burden to demonstrate that there

no longer is a medical emergency in the state. If petitioner had proved that the medical emergency no longer existed there would no longer be a need for the Act. However, the Indiana Supreme Court in Jin Cha found that petitioner had failed to introduce any evidence that there was no longer a medical emergency or compelling state interest. Jin Cha at _____, 476 N.E.2d at 109. The court in Jin Cha reviewed the evidence as proposed by the petitioner and concluded that a ground of difference did indeed exist, and that this was not negated by the petitioners. Jin Cha at _____, 476 N.E.2d at 109. The court in Johnson held that delays caused tort claimants by the Act might be severe but were constitutional and reasonable in light of the purposes of the Act. As noted by the court in Johnson:

> "The panel submission requirement generates evidence admissible at a future trial of the claim. The delay in the trial occasioned by this process at the cost attendant to it are in major part like those to be expected in any case. The particpation by the parties in the panel process will satisfy to a great extent their preparation needs. Such satisfaction will tend to reduce total aggregate time for trial preparation." Johnson at _____, 404 N.E.2d at 592.

Petitioner offered the expert testimony of two witnesses, neither of whom produced evidence to show that there was an intolerable delay. The failure of the petitioners to offer any evidence so that the court could balance the interest against the delay is a fatal flaw in the petitioner's case.

B. Petitioners Failed to Present Any Evidence That The Delays Caused By the Medical Malpractice Act are any Greater Than If Such Cases Were Not Required to Proceed Under the Act.

Even though the court in Johnson noted that the delays caused by the Act are severe, the claimants failed to offer any evidence to prove the severity of the delay. No evidence has been offered for this Court so that it could compare cases required to be filed under the Act with similar types of cases not required to be filed under the Act. Even though the Indiana Supreme Court has recognized the severity of the delay, no evidence has been presented to aid the court in determining the extent of the severity of the delay.

It is generally undisputed that the average time between the filing of a case before the Department of Insurance until a panel opinion is rendered is approximately 23.4 months. However, the evidence also showed that during this 23.4 months substantial discovery is routinely taken

by both sides while the action pends. This significant discovery often includes depositions of the parties, interrogatories, and requests for production. By the time a panel opinion is filed, much of the preliminary discovery work is already accomplished. This substantiates the analysis of the court in Johnson which noted that

> "The participation by the parties in the panel processes will satisfy to a great extent their preparation needs." Johnson at _____, 404 N.E.2d at 592.

This participation ameliorates the hardship caused by the delay, therefore negating petitioner's assertion that these delays are so intolerable that the Act does not pass constitutional muster.

C. The Specific Petitioners In This Matter Failed To Present Any Evidence That They Were Delayed Because of The Act.

The petitioners, Charles Warnick and Judith Warnick, complain that their constitutional rights were violated because of the delays caused by the Act. However, it is uncontradicted that petitioner's counsel filed this action before the Department of Insurance in April of 1983, and has not requested the formation of a panel. As noted by the Indiana Court of Appeals in its opinion regarding the default judgment action,

> "Furthermore, the Act contains time periods by which either party can keep the review process moving in order to lessen the delay. However, there is no indication that the Warnicks availed themselves of these provisions." Jin Cha at _____, 455 N.E.2d at 1168.

The court correctly stated that the Warnicks did not avail themselves of the provisions, and made no attempt to have the Act work for them.

III. WHETHER THE PETITIONER HAD STANDING TO BRING THIS DECLARATORY JUDGMENT ACTION.

The petitioners seek to have declared unconstitutional that portion of the Indiana Medical Malpractice Act which requires submission of all proposed complaints to a medical review panel prior to filing in a Court. This action was initially brought pursuant to the provisions of the Uniform Declaratory Judgment Act, Indiana Statute §34-4-10-1, et seq., which provides as follows:

> "Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, his municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise, and obtain a declaration of rights, status, or other legal relations there under."

The law in Indiana with regard to standing is clear in requiring the party to demonstrate injury. Board of Commissioners of Howard County v. Kokomo City Plan Commission, 263 Ind. 282, 330 N.E.2d 92 (1975). The Indiana Supreme Court in State v. Clark, 247 Ind. 470, 217 N.E.2d 588 (1966), stated the rule as follows:

> "It is also a fundamental proposition that the person attacking the constitutionality of a statute must have his rights adversely effected by the particular act and the particular section of the act which he is attacking."

The petitioners in this case have not been adversely affected by the Indiana Medical Malpractice Act at any time prior to or during the disposition of their declaratory judgment action. They had secured a favorable judgment in the amount of Sixty Thousand Dollars ($60,000.00) at the Trial Court level, a judgment which remained

intact until sometime after the rendering of the declaratory judgment verdict. It was made clear to the Trial Court that the default action was going to be appealed to the Court of Appeals and that no action could be taken by the Trial Court because of the appeal. Moreover, they had encountered no delay as a consequence of the panel submission provision of the act, because they did not file a claim with the Department of Insurance. As such, they can demonstrate no injury which would sanction the Court's assumption of jurisdiction.

The subject matter jurisdiction of courts is specifically limited to actual cases in controversy between parties. Brewington v. Lowe, 1 Ind. 21 (1848). A real or actual controversy must exist, or at least the ripening seeds of such a

controversy. Joercher v. Agler, 202 Ind. 214, 172 N.E. 186 (1930). At the time the Trial Court entered its decision on the plaintiffs' Complaint for Declaratory Judgment, no real controversy existed between petitioner and the respondents. The Complaint failed to place a justifiable controversy before the Court, and plaintiffs merely requested an advisory opinion which might, somehow, salvage the petitioner's default judgment which was overturned in the Court of Appeals. An action for declaratory judgment will be dismissed if there is pending another action or proceeding with some of the same parties which may adjudicate some of the identical issues involved in the declaratory action. Thomson v. Medical Licensing Board, _____ Ind.App._____, 389 N.E.2d 43 (1979). A litigant is only permitted to raise a question one time during the course of

proceedings, and the petitioners' attempt to place the issue of the constitutionality of the malpractice act before two tribunals cannot be sanctioned. Deckard v. Mathers, ____Ind. App.____, 284 N.E.2d 92 (1972). In Buchanan v. Logansport, Crawfordsville, and Southwestern Railroad Company, 71 Ind. 265 (1880), the Supreme Court of Indiana ruled that it was improper for a party to institute another action upon the same cause of action during a pending appeal. The identical issues concerning the alleged unconstitutionality of the panel provisions of the Medical Malpractice Act were raised and argued by the same parties to the declaratory judgment case, and decided by the Court of Appeals in Cha v. Warnick, supra. The Trial Court clearly was in error in allowing the petitioners to bring

the Complaint for declaratory relief despite their clear lack of standing.

IV. WHETHER THE INDIANA COURT OF APPEALS' OPINION IN JIN CHA v. JUDITH WARNICK, ____ Ind.App. ____, 455 N.E.2d 1168, IS THE LAW OF THE CASE WITH RESPECT TO THE ISSUES RAISED BY PETITIONERS CONCERNING THE ALLEGED UNCONSTITUTIONALITY OF THE INDIANA MEDICAL MALPRACTICE REVIEW ACT.

Respondent contends that the Indiana Court of Appeals' Order of November 16, 1983, in Cha v. Warnick, supra, and the Indiana Supreme Court's subsequent denial of petitioner's Petition to Transfer of March 16, 1984, is the "law of the case" with respect to the issues presented by the plaintiff concerning the alleged unconstitutionality of the Indiana Medical Malpractice Act. The petitioner raised the issue of the unconstitutionality of the Malpractice Act in both the Complaint for Declaratory Judgment under

Cause Number SD83-163, and before the Indiana Court of Appeals under Cause Number 3-1082A276.

The "law of the case" doctrine designates that an Appellate Court's determination of a legal issue is binding on both the Trial Court and Court of Appeals on a subsequent appeal given the same case and substantially the same facts. State v. Kuespert, ____Ind.____, 425 N.E.2d 229 (1981). The Indiana Court of Appeals' decision of November 16, 1983 reversed the judgment of the Trial Court and vacated the default judgment against the respondent. Jin Cha at _____, 455 N.E.2d at 1168. The court denied the petitioner's claim that the Indiana Medical Malpractice Act was unconstitutional, finding that the delay in the commencement of the trial was part and parcel

of the preparation of any piece of litigation, and that the act contains time periods by which either party could keep the review process moving in order to lessen the delay. The Court found that there was no indication in the record that the petitioners had availed themselves of those provisions. In Jin Cha v. Warnick, ____Ind.____, 476 N.E.2d 109 (1985), the Indiana Supreme Court held that petitioner was bound by the "law of the case" doctrine and that the petitioner was bound by the holding of their first appeal in Jin Cha v. Warnick, ____Ind.App.____, 455 N.E.2d 1168 (1983).

The petitioner first raised the issue of the unconstitutionality of the Indiana Medical Malpractice Act before the Indiana Court of Appeals. Jin Cha v. Warnick at ____, 455 N.E.2d at 109. The Court held that the Act was constitutional. Jin Cha

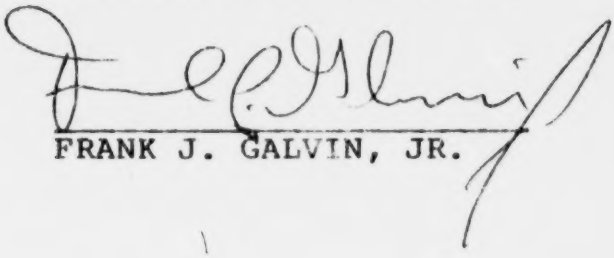
v. Warnick at ____, 455 N.E.2d at 1167-68. At that point in time, petitioner had ninety (90) days to file a Petition for Writ of Certiorari to the United States Supreme Court. The petitioner failed to do so. Subsequently, the Indiana Supreme Court in Jin Cha v. Warnick at ____, 476 N.E.2d at 114, held that petitioner was bound by the "law of the case" as determined by the Court of Appeals in the previous default action. Therefore, the petition before the Supreme Court on the issue of the constitutionality of the Indiana Medical Malpractice Act is not timely filed as the appropriate time for filing would have been ninety (90) days after the Indiana Supreme Court denied petitioner's Petition for Transfer in the default action on March 16, 1984. Thus, this Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied because: the delays caused by the Act are not so restrictive as to violate rights secured under the Constitution; there is a "ground of difference" that makes clear the reason for the different and more burdensome treatment accorded medical malpractice tort claimants; petitioner produced no evidence that the act was unreasonable in achieving its desired aim; petitioner failed to introduce any evidence that the delay caused by the Medical Malpractice Act was any greater than if such cases were not required to proceed under the Act; petitioner failed to present any evidence that they were delayed by the Act; petitioner does not have standing to challenge the constitutionality of this Act; and finally, petitioner was bound by

the "law of the case" as determined by the Indiana Court of Appeals as their Petition for Writ of Certiorari was not timely filed.

RESPECTFULLY SUBMITTED,



FRANK J. GALVIN, JR.